[2024] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL 96/2016

BETWEEN	**OWEN CHAMBERS**	**1ST APPELLANT**
AND	**ANDRE JOHNSON**	**2ND APPELLANT**
AND	**IVAN SMITH (Administrator of Estate Kathleen Chambers Smith)**	**RESPONDENT**

Ms Carol Davis for the appellants

Miss Sandra Johnson instructed by Sandra C Johnson and Company for the respondent

8, 9 November 2021 and 23 February 2024

Company law – Oppression - Whether sufficiently pleaded- conduct amounting to oppression - Directors' payment of a portion of sums due to the deceased managing director's estate to another director - Respondent being the executor of the deceased's managing director's estate-whether award of judgment is an appropriate remedy – Companies Act, s 213A (1), (2) & (3)(j)

BROOKS P

[1] I have read in draft the judgment of Simmons JA. I agree with her conclusion and reasons, therefor.

SIMMONS JA

[2] The delay in the delivery of this judgment is sincerely regretted, and the court apologizes for it.

[3] This is an appeal from the judgment of Batts J ('the learned judge') who, on 19 September 2016, gave judgment in favour of the respondent, Mr Ivan Smith ('Mr Smith'). The matter originated from a claim brought by Mr Smith against CDF Scaffolding & Building Equipment Ltd ('the company') and the appellants, Mr Owen Chambers ('Mr Chambers') and Mr Andre Johnson ('Mr Johnson'), for declaratory relief, damages, an injunction and other remedies arising from the appellants' conduct and/or management of the company after the death of Mrs Kathleen Chambers Smith, who died on 8 December 2007 ('the deceased').

[4] The deceased, up to the time of her death, held the majority of the shares in the company and was its managing director. Mr Smith is the widower of the deceased and administrator of her estate. Mr Chambers and Mr Johnson, who are directors and shareholders in the company, are the brother and nephew of the deceased, respectively.

[5] The learned judge, having declared that:

> "d. … as at the date of her death the estate [of the deceased] was entitled to $8,714,783.00 in respect of [the] Directors [sic] loan. The disbursement of that amount by [the appellants] to themselves from the account of [the company] was oppressive and prejudicial",

granted judgment in the following terms:

> "…
>
> e. Judgment for [Mr Smith] against [the appellants] in the amount of $8,714,783.00.
>
> f. Interest will run at a rate of 6% per annum from the 1st January 2009 to the date of payment.
>
> g. 50% [of the] [c]osts to [Mr Smith] against [the appellants] to be taxed or agreed."

[6] The appellants, who are aggrieved by the learned judge's findings and orders pertaining to the "directors loan", filed a notice of appeal on 28 October 2016, seeking the following relief:

> "i. That paragraphs d, e, f, and g of the Judgment of [the learned judge] dated 19th September 2016 be set aside
> ii. Further and/ other relief
> iii. Costs to the Appellants"

The grounds of appeal are as follows:

> "1. The Learned Trial Judge erred in finding that [the deceased] was entitled to $8,714,783 in respect of Directors [sic] Loan since there was no evidence to support this finding and/or the finding was against the weight of the evidence before the Court.
>
> 2. The Learned Trial Judge in making the finding that Directors [sic] Loan of $8.7million was owed to the Managing Director at the time, [the deceased] referred to (Exhibit 28). However Exhibit 28 is an Expert Report of Joshua Haye, Chartered Accountant, the Expert Witness on behalf of [Mr Smith], and there is no evidence in the said report to support a finding that $8.7 million was owed to the Managing Director at the time [the deceased].
>
> 3.That the Learned Judge erred in finding that Directors [sic] Loan of $8.7 million was owed to the Managing Director [the deceased], given the evidence of Mr Andrew Andrews an Accountant at Messrs. F.C. Swaby & Co., the Accountants for [Mr Chambers] since the 1990's. Mr Andrews was requested by the Court to review his files as to payables converted to long term loans and to whom the said loans were payable. Having reviewed his files and returned to the Court to continue his evidence, Mr Andrews said that he saw working papers on his file for the period 1993-1998 and that the only director listed as having loans was [Mr Chambers], in the sum of $5,208,200.[00]. He further said [that] he saw no document to substantiate any loan to [the deceased].

> 4. Having accepted that [Mr Chambers] had injected some capital into the business, the Learned Judge erred in saying that this was most probably by way of investment not loan, particularly in the context of evidence of Mr Andrews that [Mr Chambers] was the only director in the records of the Company listed as having loans with the Company.
>
> 5.If, which is disputed, the sums paid to the Appellants by the Company were not properly paid, then the said sums could only be subject to a Claim by the Company for their return. Given that on the findings of the Trial Judge sums greater than the sum of $8,714,783[.00] was due to the Appellants for work done pursuant to their contracts, then no order should have been made for the payment of any money by the Appellants.
>
> 6. The learned Judge erred in awarding judgment for [Mr Smith] in the sum of $8,714,783.00 since no such claim was pleaded by [Mr Smith] in its Further Amended Claim or Particulars of Claim.
>
> 7. The Learned Judge erred in awarding judgment for [Mr Smith] in the sum of $8,714,783."

[7] A counter notice of appeal was filed by Mr Smith on 15 November 2016 but was withdrawn.

Proceedings in the court below

[8] At the trial, the parties relied on the oral evidence and written reports of their respective chartered accountants. Mr David Nairne gave evidence for the appellants and Mr Joshua Haye gave evidence on Mr Smith's behalf. The appellants gave evidence and also relied on the testimony of Mr Andrew Andrews. Mr Smith gave evidence and relied on the evidence of Mr Andrew Edwards, Ms Inger Hainsley Bennett, Ms Rosemarie Salkey and Ms Rosemarie Gilbourne.

[9] Pertaining to the experts, the learned judge stated that they gave "contrasting views" of certain aspects of the company's accounts. The learned judge's impression of

those witnesses is contained in para. [6] of the judgment where he stated that he was impressed with Mr Haye's professionalism and Mr Nairne's candour. He, however, found that Mr Nairne appeared to be "unfamiliar with detailed aspects of his own report". The learned judge also stated that:

> "[i]t became apparent that [Mr Nairne] had delegated much of the fact finding relative to the report to others. He at times found it difficult to explain aspects of the company's accounts, for example:
>
> 'Q: what amount went to add to payable [sic]
>
> A: cannot say how much
>
> Q: tell us who were those creditors
>
> A: This figure of $40 million was transferred from payable to long term loan account say is book entry
>
> Q: Meaning
>
> A: [Pause] it is an entry which is made for the records
>
> Q: Does it mean nobody really is owed $40 million
>
> A: I don't know, he (the accountant) says is a book entry and he does not recollect'."

[10] The learned judge also observed that Mr Andrew Andrews, who was a representative of the accounting firm which had been largely responsible for the company's accounts and on whose evidence the appellants also relied, was not a professionally qualified accountant. Generally, the learned judge found that the company's accounting practices were unsatisfactory.

[11] The learned judge noted that because the deceased was the majority shareholder in the company, Mr Smith would have assumed her shareholding. It was also his view that the appellants would have been concerned about the operation of the company's

affairs and consequently would have sought to protect themselves. This included voting themselves additional shares and forming a new company to provide services to the company. At trial, Mr Haye conceded that the company owed money to Mr Chambers.

[12] On the issue of whether Mr Smith's case gave rise to a claim for oppression, the learned judge found that the claim was "sufficiently worded and the statement of case sufficiently particularized to give rise to a [s]ection 213A [c]laim".

[13] It was against this background that the learned judge made the orders that are the subject of this appeal as set out at para. [5] above.

Issues

[14] The grounds of appeal raise the following issues:

(i) Whether there was any evidence on which the learned judge could find that the sum of $8,714,783.00 that was designated as a "directors loan", was loaned to the company by the deceased and was consequently owed to the deceased's estate – grounds 1- 4

(ii) Whether based on the pleadings, the learned judge had the jurisdiction to deal with the claim under section 213A of the Companies Act – grounds 5 and 6

(iii) Whether the learned judge's decision to grant judgment to Mr Smith in the sum of $8,714,783.00 was an appropriate remedy under section 213A(3)(j) of the Companies Act – ground 7

Issue one: Whether there was any evidence on which the learned judge could find that the sum of $8,714,783.00 that was designated as a "directors loan", was loaned to the company by the deceased and was consequently owed to the deceased's estate – grounds 1-4

Appellants' submissions

[15] Ms Davis on behalf of the appellants commenced by submitting that the following issues arose for the court's consideration:

> "(i) Whether at [sic] the learned judge on the evidence before him erred in finding that as at the date of her death, Kathleen Chambers Smith was entitled to the sum of $8,714,783.00 in respect of [the] Directors Loan;
>
> (ii) Whether the learned judge on the evidence before him erred in finding that the disbursement of the sum of $8,714,783.00 by [the appellants] to themselves from the account of the [the company] was oppressive and prejudicial in circumstances where he accepted evidence that they were owed by the company.
>
> (iii) Whether the learned judge erred in finding that the capital injected by [Mr Chambers] was 'most probably by way of investment not loan'."

[16] Counsel submitted that the following findings of fact, recounted at para. [14] of the judgment, are relevant to these grounds of appeal:

> "…
>
> o. [Mr Smith] did not actively demonstrate much interest in the affairs of the company and I accept as stated in Paragraph 18 of the Witness Statement of [Mr Chambers], that his actions and words conveyed that impression to the [appellants]…
>
> aa. [the appellants] subsequent to [the deceased's] death entered into contracts with [the company] outlining their

remuneration. This was approved by the Board of Directors (Exhibit 38)…

ee. The accounting methods and systems of the [company] contained various irregularities for which there was no adequate or no explanation. In relation to the Company's account I find that:

> i. …
>
> iv. In 2000 to 2007 [the] directors loan was $8.7 million. This was owed to the Managing Director at the time, [the deceased] (Exhibit 28).
>
> v. The amount held on Investment as at the 31st December 2008 was $13,566,214.00 however as at the 31st January 2009 this had been reduced to $1,875,545.00. The Defendants say, and I accept, that this money was used to pay off the Directors [sic] loan [See report of Nairne & Co. Exhibit 59 page 7]. The repayment was not however made to the [deceased's estate] but to the [appellants]…
>
> vii. For the period ended 30th April 2012 [the] Directors [sic] loan balance stood at $10,343,450 and the notes explain it as follows:

Salary	$8,664,000
Accommodation	$6,108.000
Motor Vehicle Allowance	$3,900,000
Less Payments of	$8,308,550
Balance	$10,343,450

This followed on the contractual arrangements entered into with the [the company] by [the appellants] in February 2008 (p 11 Davin Nairne Report Exhibit 59) …"

[17] Counsel submitted that this court in its consideration of the appeal ought to be guided by the principle stated in **Hadmor Productions Limited et al v Hamilton and ors** [1983] 1 AC 191, that an appellate court should not lightly interfere with a decision based on the exercise of a trial judge's discretion. Reference was also made to **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, in which the role of the appellate court, in relation to findings of fact at first instance, was discussed.

[18] It was submitted further that this court should also be guided by views expressed by Savage J in **Jaguar Financial Corporation v Alternative Earth Resources Inc** [2016] BCCA 193 at paras. [63]-[64], when dealing with the review of a judge's discretion in a matter involving allegations of unfair prejudice and oppression. In this regard, Ms Davis submitted that the learned judge, in the present case, would have had to exercise his discretion in accordance with section 213A of the Companies Act. This required a determination of whether there was oppression and if so, what was the appropriate remedy.

[19] She submitted that note 4 of statement IV of the company's financial statements for the period 2004 to 2006, which indicates that the term "directors loan" is defined as "contributions made by the managing director…", is to be assessed in light of the evidence of Mr Chambers that none of the amount referred to as such in the financial statements was due to the deceased. She also asked the court to note that Mr Andrews in his evidence had stated that the term "directors loan" is used to refer to loans that are not obtained from a financial institution and where there is a reference to Managing Director's loan it does not "specifically mean that it is from the actual managing director". Counsel relied on the learned judge's observation that although Mr Andrews was not a professionally qualified accountant, he was at the material time employed by the company's accounting firm.

[20] Counsel also directed the court's attention to the evidence of Mr Andrews who stated that the working papers used to prepare the financial statements reflected that there was a "directors loan" owed to Mr Chambers in the sum of $5,208,200.00 for the period 1993-1998. It was submitted that based on those working papers he was the only named director who had loaned money to the company and there was no evidence of any loan from the deceased to the company.

[21] Counsel submitted that the report of Mr Joshua Haye (exhibit 28) does not support the finding that the "directors loan" was owed to the deceased. She stated that Mr Haye in his report, raised the question, as to whom the "directors loan" was payable. It was counsel's understanding based on the said report that the directors had from the inception of the business injected capital into the company and some of those funds were carried forward as "director's loan". Further, the monies that Mr Chambers put into the company were by way of a loan and not an investment. Additionally, neither of the appellants were repaid sums that were owed to them by the company.

[22] Counsel stated that the money which was due to Mr Smith pursuant to his contract was independent of the "directors loan". In this regard, she referred to para. [14] of the judgment in which the learned judge stated that the appellants were owed the sum of $10,343,450.00 as at 30 April 2012.

Respondent's submissions

[23] Ms Johnson submitted that Mr Smith, as the personal representative of the deceased's estate, was entitled to the legal and beneficial interest in the deceased's 196 shares in the company. She indicated that the expert report of Mr Joshua Haye explained that the deceased would have been owed money by the company as at the date of her death. It was submitted that these particulars would have been best provided by the financial statements for the period ending 31 December 2007 ('the December 2007

financial statements'). However, this document was not available when Mr Haye gave evidence on 9 October 2015.

[24] She stated that it was on 28 January 2016 during the cross examination of Mr Chambers, that the December 2007 financial statements, were "discovered disclosed in a List of Documents" and that neither Mr Chambers nor his attorney was able to inspect that document. The document she said was admitted into evidence as exhibit 54 (see further supplemental record of appeal filed on 5 October 2021). Counsel stated that in the record of appeal filed on 5 February 2021, the December 2006 financial statements are presented as exhibit 54. She stated further, that this was a "misfiling and substitution of exhibit 54 [the December 2007 financial statements] with the [December 2006 financial statements]", which was marked and admitted into evidence as exhibit 41. This, she said, was "a deliberate attempt to deceive this Honourable Court of Appeal". She pointed out that in an affidavit sworn to by Mr Chambers, it was stated that the December 2007 financial statements had been destroyed.

[25] Counsel stated that Mr Chambers during cross-examination admitted that there was a "directors loan" of $8,714,783.00 as at 31 December 2007 in accordance with exhibit 54 (the December 2007 financial statements). She also indicated that footnote 4 of the said document stated that the "directors loan" was a contribution by the managing director, was unsecured and had no specific date of re-payment. Reference was made to **Joni Kamille Young Torres v Ervin Moo Young and others** [2016] JMSC Civ 17, where the court at para. [14] explained that the court in its interpretation of commercial documents, ought to prefer the plain and ordinary meaning of the words.

[26] It was submitted that when the evidence contained in:

(a) the December 2007 financial statements;

(b) the December 2006 financial statements;

(c) the evidence of Joshua Haye;

(d) exhibit 20 (the letter dated 8 August 1998 from the deceased to The Ministry of Welfare & Sport- National Insurance Scheme Dept ('NIS department') indicating that the company had not been able to employ any permanent staff); and

(e) exhibit 21 (the letter dated 10 May 2002 to the 'NIS department' indicating that the deceased had not received a salary since the inception of the company);

is viewed cumulatively it is not difficult to see how the learned judge concluded that the "directors loan" of $8,714,783.00 was owed to the deceased. Counsel submitted that in the absence of the authentic exhibit 54 (the December 2007 financial statements), the court can rely on the December 2006 financial statements which she asserted are quite similar.

[27] Counsel noted that Mr Andrews' evidence on which the appellants relied was contradictory in the following respects:

i. the financial statements for 31 December 2004 and 2006 reflected "directors loans" of $4,319,302.00 and $5,514,783.00 respectively. Notwithstanding those figures, he maintained that the "directors loan" for the period 2000-2007 stood at $7,000,000.00;

ii. it was his evidence that Mr Chambers was owed $5,208,200.00 despite a letter from the deceased indicating that the directors were employed elsewhere (exhibit 21). In the same letter, the deceased stated that she had not been taking a salary due to the

financial state of the company and that the only income she received was by way of loans which the company was re-paying to her;

iii. when shown the original and a copy of the financial statements for the period 2009-2011, he was asked if he assisted in their preparation. Mr Andrews' initial answer was "Not really assisted but I knew they were being prepared". When questioned further he stated that he supervised the preparation of the 2009 financial statements.

iv. His evidence that a "director's loan" could be monies owing to anyone despite note 4 of statement IV in the December 2007 financial statements which states that the term refers to contributions made by the managing director. He asserted that this was standard accounting practice and explained that there was a schedule kept at the office with the name of the director to whom the loan was owed but this was not reflected in the financial statements.

[28] It was submitted that much of Mr Andrews' evidence contradicted the evidence contained in exhibits 20 and 21 which was accepted by the learned judge. Counsel stated that it was curious that he was chosen by his firm to give evidence in such an important matter as he had no professional qualification as an accountant and was at best an accounting clerk at a firm of public accountants whose reputation had previously been impugned before the court. Further counsel noted that Mr Andrews had not been named as an expert witness by the appellants. Reliance was placed on the decision of **Leslie Augustus Watt v Lelieth Watts and another** [2013] JMCC Comm 15, in which the

court found that a witness's credibility was undermined by the fact that he had stated in his witness statement that he was an accountant, when in fact he was not.

[29] She submitted further that it could be inferred from the evidence that the $8,714,783.00 had accrued to the deceased as unpaid salary and was converted to a "directors loan" and is therefore due to her estate. Additionally, the evidence supported a finding that money belonging to the company made its way to Mr Chambers' account and there was no evidence that this was by way on an error.

[30] Counsel submitted that the finding of the learned judge that the "directors loan" was owed to the deceased was based on a cumulative assessment of the evidence. There was therefore no singular reliance on exhibit 28 (the expert report of Joshua Haye). The learned judge she submitted would have considered the following:

i. Mr Haye's evidence that "some balance would have been outstanding as [the deceased was] doing daily operations, similar to how Mr. Chambers is now doing and accruing [a] balance. I would have expected any balance would have been [that of the deceased]";

ii. Mr Haye's report which indicated that receivables had increased by $12,000,000.00 during the period November and December 2009.

iii. Mr Andrews' agreement after being shown the December 2007 financial statements that the figure of $8,714,783.00 represented the "directors loan";

[31] In respect of ground 4, counsel submitted that the learned judge did not rely solely upon the evidence of Mr Andrews. Counsel noted that the following evidence was also relevant.:

i. Balances began to accrue for the deceased from the formation of the company as she had not taken any salary due to the financial state of the company.

ii. The monies that the deceased received from the company were by way of re-payment of loans she made to the company.

[32] It was further submitted that there was no evidence that: (a) Mr Chambers provided money to the deceased to pay salaries and (b) Mr Chambers and the deceased guaranteed a loan for the company from the Jamaica Development Bank.

[33] Counsel submitted that based on the totality of the evidence, the learned judge could properly find that the sum designated as "directors loan" in the December 2007 financial statements was owed to the deceased.

Analysis

[34] The appellants have taken issue with the learned judge's findings of fact. The approach of an appellate court in such cases is well-settled. In **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, Brooks JA (as he then was) stated as follows:

> "[7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. The Board stated, in part, at paragraph 12:

> '...It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in **Thomas v Thomas** [[1947] AC 484] at p 491 and Lord Hope of Craighead in **Thomson v Kvaerner Govan Ltd** 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole**. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions**. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: **Choo Kok Beng v Choo Kok Hoe** [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis as in original)

[35] In **Jaguar Financial Corporation v Alternative Earth Resources Inc** on which the appellant relied, Savage J stated at para. [63] that "[f]indings of fact may be reversed on a palpable and overriding error". See also **The Attorney General v John Mackay** [2012] JMCA App 1 and **Watt v Thomas** [1947] 1 All ER 582.

[36] It is therefore, within that context that the evidence pertaining to the learned judge's finding that the sum of $8,714,783.00 was owed to the deceased's estate is to be assessed. Mr Smith's evidence concerning the sum designated as "directors loan" was

given by Mr Joshua Haye. He stated that the "directors loan" as at 31 December 2008 stood at $8,714,783.00. That sum was reduced by $7,100,783.00 by 31 January 2009 leaving a balance of $1,614,783.00. The sum increased in subsequent years and stood at $4,351,735.00 in May 2010. That sum was completely liquidated in December 2010.

[37] During cross-examination, Mr Haye was directed to para. B5 of page 5 of his report where it stated thus:

> "I also note that the Directors [sic] loan as at December 31, 2006 stood at $5,514,514.00 as per Financial Statement of the same date. Also, Directors loan as at December 2008 was $8,714,783.00 but by the [sic] January 31, 2009, said Directors Loan was reduced by $7,100,000.00 leaving a balance of $1,614,783.00. **This indicates that there was a repayment of Directors loan in the sum of $7,100,000.00 in January 2009. An explanation is needed as to which director(s) received the director's loan repayment**." (Emphasis as in original)

[38] Earlier in cross-examination he had stated that the term "directors loan" at page 5 of his report refers to "money loaned to the company by directors". He also agreed that the company is "entitled" to repay such a loan to the particular director who made the loan to the company. Mr Haye indicated that the December 2007 financial statements would have given a better picture as to the balance due to directors at the time closest to the death of the deceased. He opined:

> "It is my view that some balance would have been outstanding as this was [the] lady doing daily operations, similar to how Mr. Chambers is now doing it and accounting balance. I would have expected any balance would have been hers."

[39] Mr Andrews who gave evidence on behalf of the appellants, stated that the term "directors loan" in the financial statements does not mean that it was given by the managing director. He stated that the details of who had given the loan would be

contained in the file with the working papers. He also asserted that it was standard accounting practice to attribute a loan to someone other than the person who provided the loan. In cross examination, he indicated that the 2007 financial statements show that the "directors loan" amounted to $7,100,000.00. When he was directed to exhibit 54, he stated that the sum attributed to "directors loan" was $8,700,000.00. He also indicated that based on the working papers the only director who had loaned money to the company was Mr Chambers. He stated definitively that there was no record of any loan from the deceased.

[40] Mr Nairne, who also gave evidence on behalf of the appellants stated in cross-examination that the directors had injected capital into the company from its inception and that some of that capital was carried forward as "directors loan". He said that the sum designated as "directors loan" applied to the appellants only. When directed to the December 2007 financial statements, he indicated that he had been told that the deceased was the company's managing director up to her death. When questioned as to whether he had been provided with those statements, he stated that they had not been given to him. He was, however, unable to say how he concluded that the said sum was not owed to the deceased.

[41] In his report, Mr Nairne stated that the "directors loan" amounted to $5,514,783.00 as at 31 December 2006. That sum as at December 2008 was $8,714,783.00 and was reduced by $7,100,000.00 by 31 January 2009. He was, however, unable to say who received that money and indicated that a further explanation was required as to which director received those sums.

[42] In cross-examination, when shown the December 2007 financial statements he agreed that the amount designated as "directors loan" was $8,714,783.00. He did, however, indicate that he had not seen those financial statements before the trial.

[43] The learned judge had the discretion to either accept or reject the evidence given by the experts. In this matter, I have inferred, based on his comments at paras. [6] and [7], that the learned judge having seen and heard the witnesses preferred the evidence of Mr Haye over that of Mr Nairne and Mr Andrews. I have noted that the December 2007 financial statements indicate that as at that date the "directors loan" amounted to $8,714,783.00. Note 4 of statement IV of the accompanying notes clearly states that the "directors loan", "represents contributions made by the managing director which is interest free and unsecured and has no fixed date for repayment". It is stated in those financial statements that the accompanying notes in Statement IV are an "integral part of [those] statements and should be read in conjunction therewith". The words in Statement IV are in my view plain and unambiguous. As such, the approach to their interpretation ought to be as was stated by Phillips JA in **Jamaica Public Service Company Limited v The All Island Electricity Appeal Tribunal and Others** [2015] JMCA Civ 17, at para. [49]:

> "[49] the plain and ordinary meaning must be applied unless there are ambiguities, and then that meaning is only displaced if it results in a commercial absurdity…."

[44] Based on the plain and ordinary meaning of the term "directors loan" as explained in note 4 of Statement IV the $8,714,783.00 was a loan by the deceased to the company. Additionally, the definition of "directors loan" in all of the financial statements that were admitted into evidence is the same. It is also noted that the financial statements were prepared by F W Swaby & Company, a firm of accountants who should be familiar with accounting terms. It cannot, therefore, be said that the learned judge having assessed the evidence in its entirety could not have properly concluded that the sum of $8,714,783.00 was loaned to the company by the deceased. No payment was made to Mr Smith and, as such, the said sum was owed to the deceased's estate. In the circumstances, grounds one to four have no merit and therefore fail.

Issue two - Whether based on the pleadings, the learned judge had the jurisdiction to deal with the claim under section 213A of the Companies Act – grounds 5 and 6

Appellant's submissions

[45] It was submitted that there were no pleadings to ground the relief granted by the learned judge to Mr Smith. This was because he did not make a claim for the repayment of the sums paid to the appellants on account of a "directors loan". The absence of such pleadings it was submitted, prejudiced the appellants as they were not placed in a position to defend the issue of the re-payment. Reference was made to **City Properties Limited v New Era Finance Limited** [2016] JMCC Comm.1 and **Mabel Demercado and another v Trevor McKenzie and another** (unreported), Supreme Court of Judicature of Jamaica, Suit No CL 1992/D 059, judgment delivered 18 September 1997, in support of that submission.

[46] It was submitted further, that the recovery of the sums paid to the appellants could only have been sought by way of a derivative action for which Mr Smith would have needed the leave of the court. In the circumstances, Mr Smith could not seek to obtain relief for a wrong allegedly done to the company. This was especially so as Mr Smith voluntarily decided to not participate in the decision-making process of the company by his failure to attend meetings. Consequently, there was no basis for a finding of unfair prejudice and/or oppression. This, she said, was appreciated by the learned judge at paras. [9], [12], [13], and [21] of the judgment.

Respondent's submissions

[47] It was submitted that the conduct of the appellants had a direct impact on the deceased and it would therefore have been her estate rather than the company who had a right to file a claim for relief under section 213A(1) and (2) of the Companies Act.

[48] Counsel noted that whilst Mr Smith did not specifically ask for the repayment of the "directors loan", it was sufficiently clear on the face of the pleadings that this relief was being sought. Moreover, in light of the overriding objective and the discretionary power which the court enjoys any unintentional omission or errors can be remedied by the court. See **Merlene Murray-Brown v Dunstan Harper & Winsome Harper** [2010] JMCA App 1 and **Cash Plus Limited (In Liquidation) v Madam** [2012] JMCA Civ 40.

Analysis

[49] The claim form that was filed on Mr Smith's behalf states that a claim was being made against the company and the appellants for:

> "an injunction restraining the appellants from continuing their unlawful and ultra vires acts and breaches of the Articles of Association of [the company] … and for Declaratory Judgments touching and concerning the appellants' status as shareholders and Directors of [the company] and for damages for conversion and breaches as well as for a Declaration concerning [Mr Smith's] equitable interest in the shares of [the company] and against [the company] for rent, for use and occupation of 2 Verbena Avenue, Kingston 11, by [the company]
>
> That as a consequence of breaches and unlawful actions and ultra vires conduct of [the appellants] [Mr Smith] has suffered loss and damage and have [sic] incurred expenses and unless [the appellants] are restrained, the financial resources of the company are at risk of being depleted and/or completely flitted away".

[50] In his further amended particulars of claim, Mr Smith at para. 7 averred that:

> "the [appellants] have by ultra vires and unlawfully [sic] means caused their names to be entered into the company's accounts and have **unlawfully removed over $10 Million Dollars from the accounts and have converted to their**

> **own use and benefits [sic] several million dollars from the said company's bank accounts which at the time of death of [the deceased] on December 8, 2007 had a total of approximately $18.8 Million Dollars but by March 31, 2008 the said accounts had the approximate sum of $8.9 Million Dollars**…". (Emphasis supplied)

[51] At para. 16 it is stated as follows:

> "That [the appellants'] conduct is oppressive ultra vires and is an improper exercise of power and authority. Such conduct is harsh, wrongful, unfair and prejudicial to the interest of [Mr Smith] and to his interest in the shares to which he is entitled and is tainted with fraud and illegality."

[52] The appellants were stated to have committed some 14 breaches of the Articles of Association of the company. However, for the purposes of this judgment, subparagraphs (f) and (h) are relevant. They are:

> "f) Converting the Company's profits to their own use and benefit.
>
> h) Converting and removing the Company's money from the company's bank accounts from funds derived from customers to their own personal use and profit."

[53] A total of 16 remedies were claimed in addition to costs. Among the remedies sought was the rectification of the share registry and "[r]estitution of all monies, profits and income falling into the hands of the appellants or any company wholly controlled by either or both of them or any third party" (see remedy no 12).

[54] Counsel for the appellants has taken issue with the learned judges' jurisdiction to treat with the repayment of sums designated as "directors loan" to Mr Chambers in the absence of a specific reference to it in the claim. Issue has also been taken with his

finding that a claim under section 213A of the Companies Act arose based on the pleadings.

[55] Section 213A of the Companies Act states:

> "213A.-(1) A complainant may apply to the Court for an order under this section.
>
> (2) If upon an application under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates-
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive **or** unfairly prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of." (Emphasis supplied)

[56] Rule 8.9(1) of the Civil Procedure Rules states:

> "The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies."

The rule is geared at ensuring that the other party is fully aware of the case that is being alleged against him so that he can properly defend the claim.

[57] In **City Properties Limited v New Era Finance Limited** on which the appellants relied, Edwards J (as she then was) at para. [92] referred to the decision of

the Privy Council in **Charmaine Bernard v Ramesh Seabalack** [2010] UKPC 15, in which it was stated:

> "15. …Part 8.6, which is headed "Claimant's duty to set out his case", provides that the claimant must include on the claim form or in his statement of case short statement of all the facts on which he relies. This provision is similar to Part 16.4 (1) of the England and Wales Civil Procedure Rules, which provides that Particulars of claim must include-(a) a concise statement of the facts on which the claimant relies". In McPhilemy v Times Newspapers Ltd [199] 3 ALL ER 775 at p792J, Lord Woolf MR said:
>
> > 'The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old and the new rules……
>
> 16. But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant. The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. Under the pre-CPR regime in England and Wales, RSC Ord 18 r 7 required that every pleading contained a summary of the

material facts and by r 12(1) that 'every pleading must contain the necessary particulars of any claim'."

[58] In **Mabel Demercado and another v Trevor McKenzie and another** (unreported), Supreme Court of Judicature of Jamaica, Suit No CL 1992/D 059, judgment delivered 18 September 1997, the court rejected the submission of counsel for the plaintiffs that adverse possession of the land that was the subject of the dispute had been established. Courtenay Orr J stated at pages 9-10:

> "Mr Brown in his closing address submitted that the Plaintiffs had established adverse possession of the land. That submission fails for three reasons: Such a claim was never pleaded; secondly, the evidence tendered in support of this issue is not sufficient to found such a claim, and thirdly, the executors should have been parties to the suit.
>
> It is trite law that in actions in the Supreme Court pleadings are of paramount importance, and that save where a preliminary objection is taken if a party wishes to obtain judgment on a certain issue it must be pleaded. This is both logical and reasonable. Jacob and Goldrein in their book, Pleadings; Principles and Practice describe the functions of pleadings in cl this way at page 2:
>
> > 'Properly drafted, the pleadings should disclose clearly and precisely the real issues which are in dispute between parties, as opposed to a recitation of evidence which each party intended to adduce at the trial. They are not mere narratives or provisional documents. The parties are bound by what they say in their pleadings which have the potential of forming part of the record, and moreover the court itself is bound by what the parties have stated in their pleadings as the facts relied on by them'." (Emphasis as in original)
>
> The learned authors then go on to state the objects of pleadings in the following words:

> 'First. To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court....
>
> Thirdly. To inform the court what are the precise matters in issue between the parties which alone the court may determine...." (Emphasis as in original)

[59] It is, therefore, well settled that parties are required to set out the facts on which they intend to rely and are bound by their pleadings. The learned judge stated at para. [24] of the judgment that the claim was "sufficiently particularized to give rise to a section 213A Claim". I agree. Paragraph 7 of the amended particulars of claim, referred to above at para. [48], makes it clear that Mr Smith was alleging that the appellants unlawfully removed approximately $10,000,000.00 from the company's bank accounts. At para. 16 of the further amended particulars of claim it is averred that their conduct was oppressive and prejudicial to Mr Smith's interests. The appellants, by virtue of the remedies sought were also in my view put on notice that a claim was being made for moneys "wrongfully falling into the hands of the [appellants]". Whilst the pleadings did not specifically refer to the payment to Mr Chambers on account of the "directors loan", they are, sufficiently wide to encompass the payment of those sums.

[60] The evidence pertaining to this issue first arose during the testimony of Mr Haye who gave evidence on the appellants' behalf. It certainly cannot be said that there was trial by ambush when the appellants' experts were given the opportunity to fully address this issue. In the report of David Nairne, who also gave evidence on behalf of the appellants, it was acknowledged that there was a re-payment of the "directors loan" in January 2009. He also stated that a further explanation was required as to whom this payment was made. Mr Chambers in cross examination was also given an opportunity to address the issue of the re-payment of the "directors loan". In his evidence, he stated that no portion of the loan was owed to the deceased. Mr Andrews in his evidence, also

spoke to the existence of a "directors loan" and proceeded to explain the nature of this loan and to whom such monies could be owed.

[61] Based on the pleadings, the appellants would have been aware that Mr Smith was generally taking issue with the wrongful payment of moneys to the appellants from the company's funds. This issue was fully addressed by the appellants' witnesses. As such, the appellants were not prejudiced as a result of the claim not being pleaded in greater detail. This is not to detract from the principle that a claim should be clearly and precisely drafted.

[62] The learned judge's finding that the claim is "sufficiently worded" and the "statement of case sufficiently particularised" cannot be said to have been "demonstrably wrong" or aberrant to warrant this court's interference (see **Attorney General of Jamaica v McKay** [2012] JMCA App 1). In the circumstances, ground 6 is without merit and therefore fails.

[63] In respect of ground 5, the learned judge found that the remedies claimed by Mr Smith are "indicative of a Section 213A application. At para. [27] of the judgment he dealt with this issue in the following way:

> "[27] There is however, the decision by the [appellants] to "repay" themselves directors loans of $8,714,783.00 from the [company's] investment account. Those were loans, as I have found, by the deceased Managing Director to the [company]. Repayment to [appellants] was oppressive and prejudicial to [Mr Smith]. [Mr Smith] is to be compensated accordingly pursuant to Section 213A(3)(j)."

[64] It was argued by counsel for the appellant that a derivative action was required as based on the circumstances of this case the alleged wrongful act was done to the company. Respectfully, I disagree. A claim may be brought under section 213A of the Companies Act by a complainant who alleges that the conduct of the business of the

company or the exercise of powers of the directors is being done in a manner that is oppressive or unfairly prejudicial to that complainant.

[65] A complainant is defined in section 212(3) as follows:

> "(3) In this section and sections 213 and 213A, 'complainant' means –
>
> (a) a shareholder or former shareholder of a company or an affiliated company;
>
> (b) a debenture holder or former debenture holder of a company or an affiliated company;
>
> (c) a director or officer or former director or officer of a company or an affiliated company."

[66] In **Sally Ann Fulton v Chas E Ramson Limited** [2016] JMSC Comm 14, Sykes J (as he then was) explained the difference between sections 212 which deals with the derivative action and 213A of the Companies Act. At para [9] he referred to the Court of Appeal of Ontario's decision in the case of **Rea v Wildeboer** 37 BLR (5th) 101. In that case, Blair JA said:

> "18 The derivative action was designed to counteract the impact of **Foss v. Harbottle** by providing a 'complainant' - broadly defined to include more than minority shareholders - with the right to apply to the court for leave to bring an action 'in the name of or on behalf of a corporation ... for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate': Business Corporations Act, R.S.O. 1990, c. B.16, s. 246 ('OBCA'). It is an action for 'corporate' relief, in the sense that the goal is to recover for wrongs done to the company itself. As Professor Welling has colourfully put it in his text, Corporate Law in Canada: The - 71 - Governing Principles, 3rd ed. (Mudgeeraba: Scribblers Publishing, 2006), at p. 509, '[a] statutory representative action is the minority shareholder's sword to the majority's twin shields of corporate personality and majority rule.'

> 19 The oppression remedy, on the other hand, is designed to counteract the impact of **Foss v. Harbottle** by providing a 'complainant' - the same definition - with the right to apply to the court, without obtaining leave, in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant. The oppression remedy is a personal claim: **Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)** (2006), 79 O.R. (3d) 81 (Ont. C.A.), at para. 112, leave to appeal refused, [2006] S.C.C.A. No. 77 (S.C.C.); **Hoet v. Vogel,** [1995] B.C.J. No. 621 (B.C. S.C.), at paras. 18-19.
>
> 20 These two forms of redress frequently intersect, as might be expected. A wrongful act may be harmful to both the corporation and the personal interests of a complainant and, as a result, there has been considerable debate in the authorities and amongst legal commentators about the nature and utility of the distinction between the two. In the words of one commentator, 'the distinction between derivative actions and oppression remedy claims remains murky': Markus Koehnen, Oppression and Related Remedies (Toronto: Thomson Canada Limited, 2004), at p. 443.
>
> 21 Yet the statutory distinctions remain in effect."

[67] At para. [10] Sykes J commented:

> "[10] From this passage, it is the case that the derivative action is designed for wrongs done to the company and not to the individual shareholder. The oppression remedy is directed at wrongs done to the individual. It is a personal claim. However, the passage recognises that in some instances the remedies overlap because the same conduct action may give rise to both actions."

[68] The learned judge found that the appellants' decision to repay themselves sums attributable to the "directors loan" of $8,714,783.00 was "oppressive and prejudicial" to Mr Smith. In **Karen Stewart v Bobby Seepersaud and others** [2022] JMCA Civ 40,

Laing JA (Ag) who delivered the decision of the court explained the difference between "oppressive" and "unfairly prejudicial" conduct. He stated:

> "[35] The Act, therefore, provides relief for conduct that is oppressive or unfairly prejudicial, concepts which may overlap to some extent. Oppressive conduct was described in **Scottish Cooperative Wholesale Society Ltd v Meyer and another** [1959] AC 324 as 'burdensome, harsh and wrongful conduct'. Unfairly prejudicial conduct is usually of a type that is less offensive and does not rise to the level of oppressive conduct. It is difficult to identify all the conduct that might be determined to be unfairly prejudicial to shareholders, but common examples include the dilution of a minority shareholder's shareholding or the exclusion of someone who is both a director and shareholder who has a legitimate expectation to be involved in its management as in the case of very small companies or quasi partnerships (see **In re a Company (No 00709 of 1992); O'Neill v Phillips** [1999] UKHL 24; [1999] 2 All ER 961)."

[69] Based on **Karen Stewart** a more stringent approach is applied where "oppressive" conduct is being alleged. It is, however, possible, for the conduct complained of to be unfairly prejudicial whilst not meeting the threshold of "oppressive" conduct. As stated by Andrew Burgess in his work, Commonwealth Caribbean Company Law, at page 335:

> "Unfair prejudice is a less stringent concept than oppression. Thus, in the Canadian case of *Miller v F Mendel Holdings Ltd* [(1984) 26 BLR 85 Sask QB], it was held that conduct complained of which may not be burdensome, harsh and wrongful and therefore oppressive may nevertheless be unfairly prejudicial.
>
> On the other hand, in approaching unfair prejudice, the courts have held that the conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interests of the shareholder (or presumably, other complainant) and that as such both unfairness and prejudice

> must be proved….The approach of the courts is to look at any prejudicial conduct from an objective point of view, to take into account any relevant circumstances and to give the expression its natural meaning without any technical gloss."

[70] Counsel for the appellants has submitted that Mr Smith's complaint regarding oppression ought to be assessed in light of his failure to attend directors' meetings. In this regard, she referred to paras. [9], [12]-[13] and [21] of the judgment. Paras. [9] and [21] state:

> "[9] After the death of his wife, [Mr Smith] continued for a while to receive monthly cheques from the company. He formed the view that the [appellants] were unlawfully attempting to take control of the company after his wife's death. He also at some stage adopted the position that he would attend no meeting of the company without his lawyer's presence …
>
> [Mr Smith] was therefore generally unaware of the operations of the company, of decisions taken, or of the keeping of records both before and after the death of his wife. He was however a generally truthful witness ….
>
> [21] This failure to exercise his right to attend meetings complicates somewhat my decision. The Defendants can credibly maintain that as directors, regardless of whether they were majority shareholders, their decisions remain valid and that there is no evidence, such as counter argument at meetings for example, to indicate [Mr Smith] would have taken any other view on the matters discussed. The decision, for example, to enter into signed contracts of employment with the [appellants] was one the directors could lawfully make. Secondly, the decision to permit the formation of CDF Scaffolding 2010 Ltd may also be within their power. If, as seems to be the case, [Mr Chambers] no longer wished to offer his services as a scaffolder directly to the [company], then it is arguably a prudent Board of Directors which would seek to retain access to his skill set by entry into a contract with his new company. It seems also that, inasmuch as [Mr Chambers] would be paid for those services anyway, it may

> have been a sound business decision. The point I make is that these are decisions a reasonable Board of Directors could make. The alleged or any loss to the Claimant is not apparent. [Mr Smith] placed himself at a disadvantage by not attending the meetings of the board at the time and articulating his objections. It is true, on the other hand, that the formation of CDF Scaffolding (2010) Ltd creates an apparent conflict of interest for [Mr Chambers] who was Managing Director of both companies. These may therefore be complaints better made by the [company] either directly or by relator action (section 212 of the Companies Act)."

[71] Para. [12] spoke to the credibility of Mr Chambers and para. [13] to Mr Haye's evidence that the company was indebted to Mr Chambers. They are not in my view relevant to the resolution of this issue.

[72] As seen above, the learned judge was addressing particular decisions that were taken at directors' meetings which he said "a reasonable board of directors could make". The payment of monies to Mr Chambers of sums found to be owing to the deceased's estate does not, in my view fall within that category. Note 4 of Statement IV in the financial statements is clear. The "directors loan" of $8,714,783.00 was owed to the person who was the managing director of the company in 2007. The payment of those sums to Mr Chambers was unfair and deprived the deceased's estate of those sums. Section 213A applies where the conduct is "oppressive or unfairly" prejudicial. Whilst the making of the payment may not have been oppressive, it was in my view capable of being viewed as "unfairly prejudicial" to Mr Smith as the administrator of the deceased's estate.

[73] The learned judge also found that Mr Smith as the administrator of the deceased's estate fell within the definition of a complainant. This issue was addressed by the learned judge at para. [24] of his judgment, where he stated thus:

> "[24] I hold that [Mr Smith] has locus standi to bring a Section 213A application. He is a complainant as defined in Section 212(3) of the Act. The complainant

> is the legal personal representative of the deceased majority shareholder and therefore is entitled to exercise the legal rights and authority vested in the owner of the shares. This includes bringing a Section 213A Claim. The Claim is sufficiently worded and the statement of case sufficiently particularised to give rise to a Section 213A Claim."

[74] Sections 213 and 213A, are concerned with the oppression remedy. That remedy is directed at wrongs done to the individual and is a personal claim. A derivative action is appropriate where the alleged wrong has been done to a company. There is no allegation of any wrong being done to the company in this case. The learned judge found that the sum of $8,714,783.00 was owed by the company to the deceased and that the said sum was consequently owed to her estate. He also found that that sum was reduced to $1,614,783.00 as at 31 January 2009 as a result of disbursements having been made to the appellants. No payment was made to Mr Smith. Those were the circumstances in which judgment was entered in Mr Smith's favour against the appellants. Any indebtedness by the company to the appellants for work done is a separate issue. The funds from which they were paid were accounted for as a "directors loan" which was clarified in the notes to the financial statements as being owed to the then managing director. Those sums ought to have been disbursed to Mr Smith who is the administrator of her estate.

[75] In **Jaguar Financial Corporation v Alternative Earth Resources Inc**, Savage J in addressing the role of an appeal court in oppression cases stated thus:

> "[64] The standard of review for oppression remedies was recently summarized in *Khela v. Phoenix Homes Limited*, 2015 BCCA 202:
>
> > [37] Whether to grant an oppression remedy under s. 227 [of the Business Corporation Act of British Columbia (the equivalent of section 213A)] is a discretionary decision, and is

> afforded significant deference on appellate review. This Court may not interfere with the order of the chambers judge dismissing the Khelas' claims unless he acted on a wrong principle, wrongly exercised his discretion by not giving sufficient weight to relevant considerations, or made a decision that results in an injustice: *Goldbelt Mines Inc. (N.P.L.) v. New Beginnings Resources Inc.* (1985), 59 B.C.L.R. 82 at para. 21 (C.A.).
>
> [38] Further, whether conduct amounts to oppression is a question of mixed fact and law. In the absence of an extricable legal error, such a finding is reviewable on the standard of palpable and overriding error: *Stahlke v. Stanfield*, 2010 BCCA 603 at paras. 21, 25; 1216808 *Alberta Ltd. (Prairie Bailiff Services) v. Devtex Ltd.,* 2014 ABCA 386 at para. 24."

[76] The learned judge in my view applied the correct principles and could not be said to be palpably wrong. In the circumstances, ground 5 also fails.

Issue three - Whether the learned judge's decision to grant judgment to Mr Smith in the sum of $8,714,783.00 was an appropriate remedy under section 213A(3)(j) of the Companies Act – ground 7

Appellant's submissions

[77] Ms Davis submitted that the evidence before the learned judge did not support any finding of fraud, unfair prejudice, or oppression to support the award made to Mr Smith. She submitted that it was Mr Smith's conduct that was adverse to the company. This included Mr Smith choosing to not attend the company meetings and holding on to the company's property. This not only denied the company of its use but also displayed an obstinate and belligerent attitude by Mr Smith towards the company's directors. Reliance was placed on the decision of **Jaguar Financial Corporation v Alternative**

Earth Resources Inc and others which addressed the requirements for entitlement to relief pursuant to the oppression remedy.

Respondent's submissions

[78] Ms Johnson submitted that the relief granted by the court was within the ambit of section 213A(3)(j) of the Companies Act which gives the court wide and far-reaching powers.

Analysis

[79] The learned judge determined that Mr Smith was to be compensated pursuant to section 213A(3)(j) of the Companies Act. That section states as follows:

> "The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order –
>
> (a) …..
>
> (j) Compensating an aggrieved person;"

[80] The learned judge dealt with this issue at paras. [25] and [27] of his judgment. Para. [25] states as follows:

> "[25] Section 213A allows the court to grant certain relief if satisfied that there has been oppression or unfair prejudice to any 'shareholder, debenture holder, creditor, director or officer of the company' as a result of:
>
> a. *Any act or omission of the company or any of its affiliates,*
>
> *b. The manner in which the business or affairs of the company or any of its affiliates are or have been carried on or conducted*

> *c. The manner in which the power of the directors of the company or any of its affiliates are, or have been exercised,*
>
> The oppression or unfair prejudice, be it noted, must be toward the complainant. This section does not enable a claim for losses or breach of duty or damage to the company. The remedies in Section 213A(3) are granted with a view to putting right the harm suffered by the complainant as a result of the oppression or unfair prejudice. Some claims by the Claimant related to alleged breaches of fiduciary duty and/or fraud on [the company]."

[81] At para. [27] of his judgment, as set out above at para. [51] of this judgment, the learned judge found that the repayment to the appellants was oppressive and unfairly prejudicial to Mr Smith. He accordingly ruled that Mr Smith was to be compensated under section 213A(3)(j). Based on the findings of the learned judge the company owed $8,714,783.00 to the deceased's estate. That loan was not repaid to her estate. The sum designated as "directors loan" in the company's financial statements for the year ending 31 December 2007 was reduced on account of payments having been made to Mr Chambers.

[82] The remedies prescribed by the statute are geared towards rectifying the wrong. In **Pelley and anor v Pelley** 2003 NLCA 6, this issue was addressed by the court. Wells, CJN having cited **McDorman v American Reserve Energy Corporation** [2002] NFCA 57, with approval at para. [33], stated thus:

> "[34] Nothing at common law permits a court to interfere with decisions or actions of a corporation or its directors that are otherwise consistent with the statutory provisions under which the corporation is created or functions, and are consistent with the articles of incorporation or by-laws of the corporation. Any such power to interfere must be found specifically in the statutory provision authorizing the granting of the remedies sought. Section 371 does not grant to a court hearing an application for a remedy, power to fashion any

> remedy which the court deems 'appropriate in the circumstances'. Subsection (2) confers on the court authority to make an order specifically 'to rectify the matters complained of.' The discretion conferred on the court is, therefore, limited to making such orders as it may deem appropriate to rectify the matter complained of. That is significantly different than any remedy which the court thinks 'is appropriate in the circumstances'. (Section 371 of the Corporations Act of Newfoundland and Labrador is similar to section 213A of the Jamaican legislation.)"

[83] Wells, CJN also cited with approval at para. [36] the following passage from **820099 Ontario Inc v Harold E Ballard Ltd** (1991), 3 BLR (2d) 113 at 197, where Farley J stated:

> "The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party."

[84] The learned judge having found that: (i) the sum of $8,714,783.00 was loaned to the company by the deceased; (ii) the loan was not repaid to her estate; (iii) Mr Smith was a complainant and (iv) the "repayment" to the appellants was "oppressive and prejudicial" to Mr Smith, could rectify the situation by awarding judgment in the said sum to him as "compensation". In the circumstances, ground 7 fails.

Disposal

[85] In the premises, this appeal ought to be dismissed and costs awarded to Mr Smith who is the successful party. This is in keeping with the principle that costs follow the event.

BROWN JA (AG)

[86] I have read the draft judgment of Simmons JA and agree with her reasoning and conclusion.

BROOKS P

ORDER

(1) The appeal is dismissed.

(2) Costs are awarded to the respondent to be agreed or taxed.